

NO. 45432-7-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER ROY SMITH,

Appellant.

BRIEF OF RESPONDENT

**SEAN BRITTAIN
WSBA # 36804
Deputy Prosecutor
for Respondent**

**Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080**

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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. The primary objective of RCW 9A.44.130 does not include the impediment of travel.
2. RCW 9A.44.130 does not deter travel.
3. When viewing the evidence in the light most favorable to the State, there was sufficient evidence to support the conviction for failure to register as a sex offender.

B. STATEMENT OF THE CASE

1) Procedural History

On May 15, 2013, the Cowlitz County Prosecuting Attorney filed an amended information charging Christopher Roy Smith with Failure to Register as a Sex Offender on, about, or between December 4, 2011 and March 8, 2012. CP 3-4. On that same date, the case proceeded to a bench trial before the Honorable Michael Evans. RP 7-67. Judge Evans found Mr. Smith guilty as charged and sentenced him to a standard range sentence of 14 months in custody and 36 months of community custody. RP 61; CP 13. Mr. Smith filed a timely notice of appeal. CP 21-34.

2) Statement of Facts

Mr. Smith has previously been convicted of a sex offense that requires him to register as a sex offender. CP 5-6. Mr. Smith had also

twice been convicted of failure to register as sex offender, the most recent conviction occurring in 2006. CP 9. Mr. Smith had registered his address with the Cowlitz County Sheriff's Office ("CCSO") in 2006. RP 27.

On November 10, 2011, Mr. Smith sent a letter to the CCSO that updated his address to 1111 9th Ave, Longview, WA. RP 24-25; CP 40. A sex offender can update his address via a certified return receipt requested letter. RP 16, 28. This information is contained in the registration notification packet, which is read verbatim and initialed by the offender. RP 15-16. Based upon the letter, Kristine Taff, the CCSO support clerk, generated a change of address form for Mr. Smith and updated the CCSO's records. RP 29.

On March 8, 2012, Longview Police Investigator Olga Lozano attempted to verify Mr. Smith's registered address by going to 1111 9th Ave. RP 33. When she arrived to that residence, she observed that it was vacant and a rental sign was in front of the house. RP 34. Ms. Lozano looked through a front window and saw that the house was completely empty. RP 34. Ms. Lozano contacted the rental agency and learned that the last tenants had been evicted in December 2011. RP 34, 41.

Tony Savelli, the property manager for 1111 9th Ave, had been in contact with Mr. Smith at the residence. RP 36-46. Mr. Savelli indicated that he had personally seen Mr. Smith at the house when he was there for maintenance work. RP 39-40. Mr. Savelli had also spoken to Mr. Smith over the phone when he called to discuss rent not being paid. RP 40.

C. ARGUMENT

1) THE FAILURE TO REGISTER AS A SEX OFFENDER STATUTE IS NOT UNCONSTITUTIONAL BECAUSE THE PRIMARY PUPOSE OF RCW 9A.44.130 DOES IMPEDE MR. SMITH’S RIGHT TO TRAVEL.

The constitutionality of a statute is reviewed de novo. *City of Spokane v. Neff*, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). A reviewing court “will presume that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose.” *State v. Glas*, 147 Wn.2d 410, 422, 54 P.3d 147 (2002); *State v. Lee*, 135 Wn.2d 369, 390, 957 P.2d 741 (1998). “If possible, a statute must be interpreted in a manner that upholds its constitutionality.” *State v. Halstein*, 122 Wn.2d 109, 123, 857 P.2d 270

(1993) (*following Tacoma v. Luvene*, 118 Wn.2d 826, 841, 827 P.2d 1374 (1992), *State v. Dixon*, 78 Wn.2d 796, 804, 479 P.2d 931 (1971)).

“A statute is overbroad if it sweeps constitutionally protected free speech within its prohibitions and there is no way to sever its unconstitutional applications. *Lee*, 135 Wn.2d at 387 (*following State v. Talley*, 122 Wn.2d 192, 210, 858 P.2d 117 (1993), *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989)). Where a court finds that a statute is unconstitutional “as applied,” the statute cannot be applied again under similar circumstances. *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). If a court finds a statute facially unconstitutional, the statute must be struck down. *Id.* However, if there are circumstances in which a statute can be constitutionally applied, a facial challenge must be rejected. *Id.*

If a fundamental right is at issue, the State must have a compelling interest to justify the statute that limits this right. *State v. Schimelpfenig*, 128 Wn. App. 224, 226, 115 P.3d 338 (2005). The right to travel is a fundamental right and subject to strict scrutiny. *Kent v. Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.3d.2d 1204 (1958); *City of Seattle v. McConahy*, 86 Wn. App. 557, 571, 937 P.2d 1113, *review denied*, 113 Wn.2d 1018,

948 P.2d 338 (1997). “A state law implicates the right to travel when it *actually* deters such travel and where impeding travel *is its primary objective*.” *State v. Enquist*, 163 Wn. App. 41 (2011), *review denied*, 173 Wn.2d 1008 (2012) (*emphasis added*).

In the present matter, Mr. Smith’s contention that RCW 9A.44.130 is unconstitutionally overbroad is without merit. Mr. Smith cannot demonstrate beyond a reasonable doubt that RCW 9A.44.130 is facially invalid or unconstitutional “as applied.” First, despite Mr. Smith’s argument, and as previously recognized by the courts, the State does have a compelling interest that justifies the statute. “The statute was enacted to ‘assist local law enforcement agencies’ efforts to protect their communities by regulating sex offenders.”” *Enquist*, 163 Wn. App. at 51 (*quoting* Laws of 1990 ch. 3, § 401). “Impeding travel *has never been* RCW 9A.44.130’s primary goal.” *Id.* (*emphasis added*).

Furthermore, the failure to register as a sex offender statute does not contain any provisions that intend the impediment or restriction of travel. Likewise, the statute does not actually prevent Mr. Smith from traveling. Mr. Smith is not prohibited from moving his residence, nor is he prohibited from moving to a different city, county, or state. “The

statute...permits a registrant to travel or move out of the state for work or educational purposes, if he...timely registers with the new state and notifies the sheriff of the last Washington county in which he registered.”
Id.

Mr. Smith claims that he cannot be away from his primary residence for more than three days. *Petitioner's Brief* at 8. This is an unfounded legal conclusion contrary to the prevailing case law. “A residence ‘is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.’” *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999). Mr. Smith can maintain a residence *and* travel to another location. For example, under the above definition of “residence,” Mr. Smith could travel to Spokane for four weeks as long as he intends on returning to his residence. He is not required to re-register when he goes on vacation. He has no duty to notify law enforcement when he travels. RCW 9A.44.130 requires Mr. Smith to register only when he changes his primary residence or ceases to have a fixed residence. Mr. Smith fails to provide any evidence that RCW 9A.44.130 restricts his ability to travel.

2) THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT MR. SMITH'S CONVICTION FOR FAILURE TO REGISTER AS A SEX OFFENDER.

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *State v. Jones*, 63 Wn. App. 703, 707-08, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993). A reviewing court need not itself be convinced beyond a reasonable doubt, *Jones*, 63 Wn. App. at 708, and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). In the present matter, when looking at evidence in the light most favorable to the

State, there clearly was sufficient evidence presented to the trier of fact to support Mr. Smith's conviction.

a. The State presented sufficient evidence to show Mr. Smith updated his address.

In regards to the letter, Ms. Taff testified that a sex offender can update his address is by a certified return receipt requested letter. RP 16, 28. This information is contained in the registration notification packet, which is read verbatim and initialed by the offender. RP 15-16. Based upon the letter, Ms. Taff generated a change of address form for Mr. Smith and updated the CCSO's records. RP 29.

A rational trier of fact could conclude that Ms. Taff followed the CCSO's policies and procedures when updating Mr. Smith's address. Ms. Taff testified that on November 10, 2011, she received a letter from Mr. Smith updating his address. RP 25. As stated above, an address update via mail can only be done through a certified return receipt requested letter. Ms. Taff updated Mr. Smith's address. It is unmistakable, based upon Ms. Taff's actions, that the court properly found that the letter received from Mr. Smith was a certified return receipt requested letter. CP 40.

The trial court also properly concluded that Mr. Smith was the individual who sent the letter. RP 57-58; CP 41. The rules of evidence permit a court to compare the writing in question with a specimen that has previously been authenticated to establish identity. ER 901(b)(3).

Furthermore:

It was the function of the court to decide the factual question whether or not the appellant had written his questioned document. In make the determination, it was proper for the court, as the trier of the facts, without the aid of an expert witness to make a comparison of the disputed writing with a standard produced in court.

Mitchell v. Mitchell, 24 Wn.2d 701, 704, 166 P.2d 938 (1946).

The State provided the court with Exhibits 4 and 5, Mr. Smith's judgment and sentences from his two previous convictions. The trial court looked at Mr. Smith's signatures on those documents and compared them with Exhibit 6, Mr. Smith's letter, and Exhibit 3, Mr. Smith's registration form. RP 57-58. The trial court noted the unique characteristics of Mr. Smith's signature, especially the "S." RP 58. The courts findings and conclusions in regards to the letter are supported by sufficient evidence.

b. The State presented sufficient evidence that Mr. Smith failed to comply with RCW 9A.44.130.

“An offender’s residential status is not an element of the crime of failure to register.” *State v. Peterson*, 168 Wn.2d 763, 774, 230 P.3d 588 (2010). “There is only one method by which an offender fails to register, and that is if he moves from his residence without notice.” *Id.* at 770. Mr. Smith argues that the State did not prove that Mr. Smith actually resided at 1111 9th Ave or that he actually moved from his previously registered address. As stated above, Mr. Smith updated his address with the CCSO. When Mr. Smith was evicted from 1111 9th Ave in December 2011, he was required to again notify the CCSO of a new address. As Ms. Taff testified, this did not occur until May 2012.

Other than the letter, the State presented evidence that established that Mr. Smith resided at 1111 9th Ave. Mr. Savelli testified that he personally observed Mr. Smith at 1111 9th Ave. When asked whether he had ever seen and spoken Mr. Smith before, Mr. Savelli indicated that he had. RP 39. Mr. Savelli stated “Yes. I seen him on a few occasions. I – we had maintenance work orders to do at the property, so when we

showed up, we seen the gentlemen there inside the property then.” RP 40. Mr. Savelli testified that he would regularly call the residence and remind the tenants that they had to pay their rent. During these phone calls, Mr. Savelli testified that Mr. Smith would answer the phone. RP 40.

The trial court noted that when Mr. Savelli was testifying to this information, he was looking at Mr. Smith. RP 59. Although this is not a conventional method of identification, Mr. Savelli is still identifying Mr. Smith as the individual he would see when he was at the residence.

Mr. Savelli testified that Mr. Smith and Ms. Weatherly were evicted from the residence at the end of December, 2011. RP 41. Ms. Lozano testified that on March 8, 2012, she went to 1111 9th Ave to verify Mr. Smith’s address. RP 33. When she arrived to that residence, she observed that it was vacant and a rental sign was in front of the house. RP 34. Ms. Lozano looked through a front window and saw that the house was completely empty. RP 34.

Finally, if Mr. Smith had remained residing at his previously registered address, he would still have been in violation of the statute because he would not have been residing at his registered address. It is his

duty to properly inform the CCSO where he is residing. If he fails to do so, he's in violation of RCW 9A.44.130.

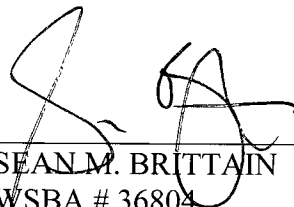
D. CONCLUSION

For the reasons argued above, Mr. Smith's conviction should be affirmed.

Respectfully submitted this 1st day of May, 2014.

SUSAN I. BAUR
Prosecuting Attorney

By:


SEAN M. BRITTAIN
WSBA # 36804
Deputy Prosecuting Attorney
Representing Respondent

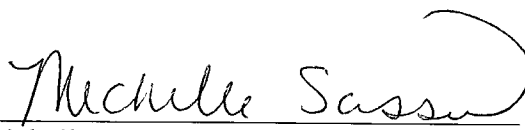
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. box 6490
Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 2nd, 2014.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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